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CHARLES FLEWELL TRIPLE  
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IN THE  
**Supreme Court of the United States**  
October Term, 1942.

No. 1061 78

FINCK CIGAR CO., INC., PETITIONER,  
versus  
COMMISSIONER OF INTERNAL REVENUE,  
RESPONDENT.

**Petition for a Writ of Certiorari**  
to the United States Circuit Court of Appeals,  
for the Fifth Circuit.

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Majestic Building,  
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## I N D E X

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Opinions below .....	1
Jurisdiction .....	2
Question presented .....	2
Statute involved .....	2
Statement .....	2
Specification of errors to be urged.....	3
Reasons for granting the writ.....	3
Conclusion .....	3
Appendix .....	4

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## C I T A T I O N S

### Cases:

Cones & Son Mfg. Co. v. Commissioner, 123 F. (2d) 530.....	3
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### Statutes:

#### Revenue Act of 1936:

Section 902 .....	4
Section 907 (a) .....	4
Section 907 (e) .....	4



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**Petition for a Writ of Certiorari**

to the United States Circuit Court of Appeals,  
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Finck Cigar Co., Inc., prays that a writ of certiorari  
issue to review the judgment of the United States Circuit  
Court of Appeals for the Fifth Circuit entered in the above-  
entitled cause on March 5, 1943.

**OPINIONS BELOW.**

The memorandum opinion of the Processing Tax Board  
of Review (R. 19-22) is unreported. The opinion of the  
Circuit Court of Appeals (R. 95-99) is reported in 134 F.  
(2d) 261.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 5, 1943. (R. 100). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED.

Whether Processing Tax Board of Review's findings of fact with respect to increased costs of labor and material rebutted its findings of fact with respect to margins.

## STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, p. 4.

## STATEMENT.

The facts, as found by the Processing Tax Board of Review (R. 19-21), may be summarized as follows:

During the period from October 1, 1933, to May, 1935, petitioner was a processor engaged in processing tobacco into cigars, and paid processing taxes of \$20,126.25. (R. 19).

During the tax period petitioner manufactured eight or ten brands of cigars, and during said period the selling prices of all brands except two remained the same. The selling prices of two brands were raised \$1.50 per thousand because of the increased costs of labor and material, and to meet the current prices of popular brands. (R. 20).

The margin for the period before and after the tax was \$1.7612 per pound of tobacco, and the margin for the tax period was \$1.7973 per pound. (R. 21).

## SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Board's fact findings with respect to margins were not rebutted by its fact findings with respect to increased labor and material costs.

2. In failing to reverse the decision of the Processing Tax Board of Review or, in the alternative, in failing to remand the cause for more specific findings with respect to costs.

## REASONS FOR GRANTING THE WRIT.

In affirming the Board's decision, the Circuit Court of Appeals held, in effect, that the Board's findings with respect to margins were not rebutted by its findings with respect to increased costs of labor and material, neither of which was reflected in the margin computations (a large quantity of material was on hand when the tax went into effect). The decision below is thus directly in conflict with *Cones & Son Mfg. Co., vs. Commissioner*, 123 F. (2d) 530 (C. C. A. 7th), where it was held that where the increased price of certain cotton goods sold by the taxpayer was due to the increased cost of labor and the increased replacement cost of materials, and not to the tax itself, taxpayer sustained the burden of proof that it did not pass on the tax.

## CONCLUSION.

Wherefore it is respectfully submitted that this petition should be granted.

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